

Child Victims with Disabilities



A Guide for Prosecutors

About the Authors

Zero Abuse Project envisions a world where every child is free from abuse. We protect children from abuse, maltreatment, and sexual assault by engaging people and resources through a trauma-informed approach of education, research, advocacy, and advanced technology.

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General Overview

Nearly 700,000 children experience abuse, maltreatment, or neglect each year, with the most common allegations being physical neglect, physical abuse, and sexual abuse.¹ Since child abuse is vastly underreported, this figure is not entirely reflective of the scope of the issue. Of the children that experience child abuse and maltreatment, children with disabilities are affected at

¹ National annual child abuse statistics cited from U.S. Administration for Children & Families, *Child Maltreatment 2019*. This data, released annually, is the most current federal data available. <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment>

staggering rates, despite being underrepresented in our child protection and judicial systems. Children with disabilities are at least three times more likely to be abused or neglected than their peers without disabilities,² and they are more likely to be seriously injured or harmed by maltreatment.³

At the same time, disabilities themselves are not monolithic and are often co-present. Accordingly, prosecutors handling these important cases must be prepared to serve and advocate for individual child victims' unique physical, cognitive, and emotional needs. This obligation extends throughout the prosecution, including: the pretrial process, preparation of the child to testify, development of courtroom accommodations, expert witness and competency considerations, utilization of Individual Education Programs (IEPs), jury selection, and integration of case themes. This guide addresses each of these components of the prosecution and concludes with sample motions to implement recommendations.

Pretrial Preparation

Building Rapport

In the pretrial process, prosecutors must spend significant time both building rapport to ensure child victims are comfortable and willing to participate and gathering information needed to better understand what the child needs to communicate. Sometimes a child may be reluctant or offer minimal information. When this occurs, it is important for prosecutors to maintain a trauma-informed approach and not become interrogative or coercive in their questioning. Prosecutors should avoid aggressive or impatient approaches, since these disrupt rapport and mirror perpetrator power dynamics.

One way to build rapport is by using appropriate language. Ideally, prosecutors should follow the language children and families use to talk about their identities and experiences. What may be affirming or reflective for one child or family may not be affirming or reflective for others.⁴ Prosecutors' ultimate goal is to determine how to make the legal process more accessible for children and families. To that end, they should be mindful of phrasing, especially with questions about cognitive and developmental levels. For example, a question directed to a parent such as "What is your child's functioning level?" can have a negative connotation, implying the child's lack of

² Jones, L. et al. (2012). Prevalence and risk of violence against children with disabilities: A systematic review and meta-analysis of observational studies. *Lancet*, 380, 899–907. doi: 10.1016/S0140-6736(12)60692-8

³ Sedlak, A. J. et al. (2010). Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress. Retrieved from <http://www.childhelp.org/wp-content/uploads/2015/07/Sedlak-A.-J.-et-al.-2010-Fourth-National-Incidence-Study-of-Child-Abuse-and-Neglect-NIS%E2%80%934.pdf>.

⁴ When in doubt, use people first language (PFL)—language that "puts the person before the disability, and describes what a person has, not who a person is." People First Language, July 2006, <https://odr.dc.gov/page/people-first-language>. PFL is generally recommended when working with children and families. *Id.* For example, instead of using outdated terms such as "handicapped person" or "disabled person," saying "person with a disability" centers the person's identity instead of their disability. At the same time, some disability advocates reflect that identity-first language can be a point of pride. Northwest ADA Center, Respectful Interactions: Disability Language and Etiquette. <https://nwadacenter.org/factsheet/respectful-interactions-disability-language-and-etiquette>

capacity. Instead, asking the parent, “Can you tell me how your child communicates?” affirms that any way the child communicates is okay; it is just helpful for prosecutors to know what that method looks and sounds like.

Terminology around identity is often shifting and advancing as communities find language that is affirming and more accurately fits their experiences. Local disability justice centers or disability rights organizations (or regional or national organizations)⁵ can be important resources for prosecutors seeking to update language utilized throughout the legal process. If prosecutors use language that causes offense or is corrected, it is important that they acknowledge the correction by apologizing, thank the person for the correction, and shift their practice in the future.

Determining the Child's Specific Disability

According to the World Health Organization,⁶ disability has three dimensions:

1. **Impairment** in a person's body structure, body function, or mental functioning. Examples of impairments include loss of limb, vision, or memory.
2. **Activity limitation**, such as difficulty seeing, hearing, walking, or problem solving.
3. **Participation restrictions** in daily activities, such as working, engaging in social and recreational activities, and obtaining health care and preventive services.

When thinking about people with disabilities, prosecutors should acknowledge that the population is very diverse, with unique experiences and varied needs. It is important to acknowledge that none of these experiences or identities exist without context. In turn, the experience of having one or more disabilities in conjunction with experiences of abuse and maltreatment—as well as other social or cultural experiences and identities—will create distinct conditions, needs, and required support for each child. Understanding the child's existing struggles and diagnosis may help prosecutors better understand communication methods and techniques to utilize, as well as certain struggles the child may encounter throughout the trial process. In 2012, the American Bar Association (ABA) published “Best Practices for Interviewing Children with Disabilities,”⁷ which outlines specific approaches to take for children with the following disabilities:

- Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder
- Autism Spectrum Disorder & Asperger's Syndrome
- Selective Mutism/Other Verbal Disabilities
- Low Functioning
- Deafness
- Reactive Attachment Disorder
- Children at Risk of Self Harm

⁵ National Disability Rights Network, <https://www.ndrn.org>; National Disability Institute, <https://www.nationaldisabilityinstitute.org>

⁶ World Health Organization, *International Classification of Functioning, Disability and Health (ICF)*. Geneva: 2001, WHO.

⁷ Christina Rainville, *Best Practices for Interviewing Children with Disabilities*, ABA: Child Law Practice Today (May 1, 2012), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_31/may_2012/best_practices_forinterviewingchildrenwithdisabilities/

- Post-Traumatic Stress Disorder

It is worth prosecutors bearing in mind, however, that children's disabilities can range much more broadly than this list.

Meeting with Caregivers, Teachers, and Others

By meeting with the child's caregivers, teachers, and special educators, prosecutors will gain a better understanding of the accommodations the child requires, as well as how the child best communicates. Prosecutors may also consider utilizing all parties who regularly communicate with the child—these parties may provide meaningful insight on the child's preferred communication methods for the jury. They may also be useful as lay witnesses to contextualize the child's communication methods.

Additionally, prosecutors may wish to consult with disability advocates. These consultations can be conducted without revealing any identifying information about the child or the case. For example, prosecutors may wish to call a disability justice center and ask about information regarding a certain disability and communication considerations. If the center is not a part of the local multidisciplinary team (MDT), prosecutors can ask for advice or information using hypothetical situations.

Learning the Child's Communication Methods

Learning the child's preferred communication methods is of the utmost importance. When communicating with the child before trial, prosecutors should make note of these methods and plan in advance how to best accommodate them in trial. Additionally, rapport between child and prosecutor is a prerequisite to communication—prosecutors should be sure to account for developing this connection and spend extra time with the child to ensure their comfort.

Common ways children with disabilities communicate:

- Verbal
 - Can the prosecutor hold a steady conversation with the child?
 - Does the child require shortened sentences to understand meaning?
 - Does the child require extra guidance in a conversation?
 - Can the prosecutor use nonliteral language without confusing the child?
 - Is the child uncomfortable with an audience?
 - Would the child benefit from testifying via an alternative method?
- Nonverbal
 - Does the child use distinct body language to respond?
 - Is the child fluent or semi-fluent in sign language?
 - Will the child communicate through a third party?

Another consideration when determining the child's communication methods is ways in which the child expresses agitation and frustration. The process of testifying can be frustrating for all children

and managing that frustration in a child-centered approach will assist in managing any manifestation of that on the witness stand. Prosecutors should consider these methods when crafting courtroom accommodation motions, discussed below.

Preparing the Child to Testify

To help the child understand the nuances of court, prosecutors should take certain steps to ensure the child's comfort with the courtroom and trial procedures. What may already be an unnerving process for other victims has the potential to overwhelm a child with a disability. Extra preparation allows the child to gain confidence and comfort, and may also help prosecutors to determine potential accommodations the child may need during trial. Possible actions for prosecutors include:⁸

- Showing the child around the courtroom, explaining the titles and roles of court personnel, and trying to simulate all parties involved (e.g., positioning a victim advocate in the jury box, on the bench, at opposing counsel's table)
- Introducing the child to bailiffs, clerks, and court reporters in advance of trial
- Simulating the trial by putting the child on the stand
- Conducting a mock testimony with the child. In rare circumstances, prosecutors may consider asking a colleague to interrupt or yell "objection!" while the child is answering questions to exemplify the chaos they may expect during trial. Prosecutors should explain the reasoning behind objections and assure the child that it is not a personal attack on them.
 - These mock objections should only be made if absolutely necessary (i.e., prosecutors anticipate an aggressive performance by defense counsel and filed accommodation motions for counsel to "speak in reasonable tones," with motions having been subsequently denied).
 - Prosecutors should remember their responsibility to maintain trust and protect the child during the trial.

Courtroom Accommodations

Arguments in Favor of Accommodations

It is prosecutors' responsibility to advocate for the needs of the victim. Children with disabilities often need additional accommodations in the courtroom. Prosecutors can make a strong argument for a

⁸ Christina Rainville, *Prosecuting Cases for Children on the Autism Spectrum*, ABA: Child Law Practice Today (Apr. 1, 2013), available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/april-2013/prosecuting-cases-for-children-on-the-autism-spectrum/

court order that ensures the taking of the child's testimony is sensitive and designed to ensure the accuracy of the evidence provided.⁹

It is critical that prosecutors file and argue pretrial motions for courtroom accommodations well in advance of trial in order to reflect the court's rulings while preparing children to testify. Knowing which accommodations have been allowed enables prosecutors to adapt to any adverse accommodation rulings and adjust trial strategies, if necessary.

§ 611(a)(3) of the Federal Rules of Evidence protects witnesses from harassment or undue embarrassment.¹⁰ Accommodations related to the child's disability directly address that requirement. Additionally, if a child with an intellectual disability needs accommodations to testify accurately, the court must provide that accommodation under the Americans with Disabilities Act of 1990 (ADA).¹¹ Sample motions for courtroom accommodation are included at the end of this guide.

Use of Language

Some children's communication and accommodation needs may extend beyond prosecutors. If the child's disability poses a unique struggle in understanding certain language and figures of speech, prosecutors should endeavor to alert the opposing counsel and judge to inform about ways to accommodate the child. Examples of prosecutors' requests include that:¹²

- Questions contain no expression and no nonliteral language
- Questioning is limited and sentences are constructed to be short and simple
- All parties allow for the child to have extra time allotted to process and answer questions
- Larger words not be used.

Additionally, across the United States, many courts have granted special communication accommodations. These instances include, but are not limited to, allowing the child to communicate via pencil tapping,¹³ nodding,¹⁴ writing,¹⁵ grunting,¹⁶ and pointing and gesturing.¹⁷

⁹ Victor I. Vieth, *A Children's Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, 1(2) CENTERPIECE (2008).

¹⁰ Fed. R. Evid. 611(a)(3).

¹¹ Christina Rainville, *Prosecuting Cases for Children with Intellectual Disabilities*, ABA: Child Law Practice Today (Dec. 1, 2012).

¹² Christina Rainville, *Prosecuting Cases for Children on the Autism Spectrum*, ABA: Child Law Practice Today (Apr. 1, 2013), available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/april-2013/prosecuting-cases-for-children-on-the-autism-spectrum/

¹³ See *People v. Tran*, 54 Cal.Rptr.2d 905 (Cal. Ct. App. 1996) (allowing witness with brain damage to testify by tapping a pencil once for "yes" and twice for "no" because it did not hinder the defendant's right to confrontation).

¹⁴ See *Commonwealth v. Brown*, 884 N.E.2d 488 (Mass. 2008) (holding that witness' nodding in combination with a few verbal responses did not allow him to evade verbal communication that might have made his testimony appear less credible and thus was acceptable communication).

¹⁵ See *Turner v. Commonwealth*, 758 S.E.2d 81 (Va. Ct. App. 2014) (finding that the trial court had not erred in allowing the child victim to write certain portions of her testimony because the defendant was able to observe her demeanor and cross-examine her).

¹⁶ See *United States v. Bell*, 367 F.3d 452 (5th Cir. 2004) (holding that the trial court had not erred in allowing the Deaf and mute victim to communicate via a series of grunts and gestures which were interpreted by victim's sister because the jury heard defendant's alternative interpretation and were presented with evidence of the sister's emotional connection to the case).

¹⁷ See *People v. Spencer*, 457 N.E.2d 473 (Ill. App. Ct. 1983) (allowing mute victim to gesture to letters, numbers, colors, picture symbols, and an anatomically-correct doll to testify because the defendant was able to cross-examine the witness via the same methods).

Leading Questions

Leading questions are typically not permitted during direct examination of a witness. However, due to the challenges some individuals on the autism spectrum face in processing language, leading questions may be necessary to elicit responses.¹⁸ Conversely, it is also possible that a child may give the wrong answer when asked a leading question because of their desire to please adults by agreeing with whatever is said.¹⁹ Within the Notes of the Advisory Committee on Proposed Rules for Fed. R. Evid. 611, the committee notes the necessity for use of leading questions with “the child witness or the adult with communication problems.”²⁰ A child with a disability is very likely to meet this criterion. Many courts have found that leading questions may be necessary in questioning witnesses when the individual may have difficulty understanding prosecutors, or when it will result in more efficient and less biased testimony.²¹

When questioning a child with a relevant disability, it is important that prosecutors follow chronological order, be clear when transitioning from one topic to the next, and give parameters on how long questioning will take.²² Additionally, prosecutors may find it beneficial to ask the child to repeat the question in their own words to solidify their understanding.²³

Support Animal or Person

Research shows that the presence of a support person helps children to respond to direct and cross-examination questions. Moreover, a number of state legislatures and a substantial body of case law approve of such support.²⁴ Meeting with the child’s caregivers, parents, teachers, therapists, MDT members, and others will help prosecutors determine the optimal person to provide support in the courtroom.

Seventeen states have laws in place to allow the use of an animal for witness support. In February 2021, the ABA passed a resolution urging the passage of statutes and laws allowing facility dogs for witness support. The resolution states, “The American Bar Association urges federal, state, local,

¹⁸ Fed. R. Evid. 611(c). “Leading questions should not be used on direct examination *except as necessary* to develop the witness’s testimony” (emphasis added); Christina Rainville, *Prosecuting Cases for Children on the Autism Spectrum*, ABA: Child Law Practice Today (Apr. 1, 2013), available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/april-2013/prosecuting-cases-for-children-on-the-autism-spectrum/

¹⁹ Christina Rainville, *Prosecuting Cases for Children with Intellectual Disabilities*, ABA: Child Law Practice Today (Dec. 1, 2012), available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_31/december_2012/prosecuting_casesforchildrenwithintellectualdisabilities/

²⁰ Fed. R. Evid. 611(c).

²¹ See, e.g., *Trevino v. State*, 783 S.W.2d 731, 733 (Tex. Ct. App. 1989) (allowing for leading questions with 15-year-old victim who had difficulty communicating in English, was enrolled in special education programs, and struggled with memory recall); *People v. Augustin*, 112 Cal. App. 4th 444, 449-50 (Cal. Ct. App. 2003) (holding trial court did not err in allowing prosecutor to ask leading questions to witness with speech impediment, rather than appointing an interpreter); *Lopez v. State*, 2012 WL 256103 (Tex. App.) (allowing leading questions for a child who had been sexually assaulted and was in special education classes at school).

²² Christina Rainville, *Prosecuting Cases for Children on the Autism Spectrum*, ABA: Child Law Practice Today (Apr. 1, 2013), available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/april-2013/prosecuting-cases-for-children-on-the-autism-spectrum/

²³ Adult Advocacy Centers, *Prosecutor’s Guide for Crimes Involving Victims with Disabilities*, 1, 13 (Feb. 2020).

²⁴ Victor I. Vieth, *A Children’s Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, 1(2) CENTERPIECE (2008).

territorial and tribal governments and foreign governments to enact laws authorizing courts to allow specially trained dogs (called facility dogs) to assist victims/vulnerable witnesses in their participation at any stage of the criminal justice system, including during their testimony in any judicial proceedings, and, to ensure the health and well-being of the facility dogs."²⁵ Additionally, the ABA stated:

- A support animal can assist a child in testimony and protect the child's rights as a victim.
- An ADA service animal must be allowed.
- A pre-trial motion should be filed with the court and address the following points:
 - Why the presence of the animal makes a difference
 - The qualifications of the animal and the training received
 - The number of times the animal has been present during testimony in other cases
 - Proposing a jury instruction to cure any potential risk of prejudice.

If a support animal is allowed during testimony, all preparation efforts and courtroom practices should include the animal to ensure the child is comfortable and adjusted to its presence. If the use of the animal becomes a distraction or is otherwise not in the best interest of the child, prosecutors should consider proceeding without.

Comfort Items

Should a comfort person or animal not be available or appropriate for the situation, courts across the country have also recognized the benefits of allowing child victims to testify with a comfort item. A stuffed toy such as a teddy bear often reduces a child's anxiety while testifying. Research documents that these "comforting objects are more than mere toys. They symbolically represent a little bit of a mother's ability to soothe the child when frightened or nervous. Their presence helps children calm themselves when parents are not immediately on hand."²⁶

Prosecutors should consider which comfort items may be appropriate given the child's unique needs. A favorite stuffed animal or fidget toy²⁷ could also help the child focus their attention and improve the accuracy and responsiveness of their testimony. Prosecutors should seek a pretrial ruling on the comfort item and incorporate the approved item into the trial preparation process. Toys that prove to be a source of distraction and noise should be avoided.

²⁵ American Bar Association [ABA], Resolution 101A, February 22, 2021.

²⁶ Victor I. Vieth, *A Children's Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, 1(2) Centerpiece (2008) (citing John E.B. Myers, Karen J. Saywitz, and Gail S. Goodman, Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony, 28 PACIFIC LAW JOURNAL 3, 63 (1996)).

²⁷ See Lindsey Biel, MA, OTR/L, *Fidget Toys or Focus Tools?*, Sensory Smarts: Autism File (June 2017), <https://www.sensorysmarts.com/AADJun17.pdf>; see also National District Attorney Association: National Center for Prosecution of Child Abuse, *A Child Fair Courtroom - Comfort Items*, at 2-3 (Oct. 14, 2014) https://ndaa.org/wp-content/uploads/Comfort_Items_11_7_2014.pdf (discussing how comfort items such as blankets or stuffed animals can calm a child during stressful situations and allow them to communicate more effectively).

Sequestration

Every piece of a child abuse investigation and prosecution must be victim-centric, and this extends to the order and sequestration of witnesses. Consider which sequence of witnesses most decreases pressure on the child and enables the jury to accurately contextualize and assess their testimony. For example, testimony from a caregiver describing the child's particular communication methods or typical demeanor while under stress (without predicting that the child will exhibit a particular behavior in the courtroom) could be critical information for juries to consider prior to the child's testimony.

Often, family members are supportive of the perpetrator, and their presence in the courtroom during the child's testimony can be a source of distraction, embarrassment, harassment, and intimidation. If these family members are potential fact witnesses, prosecutors should consider adding them to the witness list, and utilizing subpoenas, sequestration, and witness sequence to prevent this dynamic. Prosecutors should be prepared to articulate the justification for these sequestered individuals to testify.²⁸ Witness intimidation is a recognized basis for sequestration in many states.²⁹

Prosecutors should also consider moving to exempt the State's expert witnesses from sequestration where appropriate. Exemption can provide a critical source of insight to prosecutors and enhance the value and insight of the State expert's testimony and rebuttal.³⁰

Physical Accessibility

Many courtrooms are not currently designed to meet the needs of individuals with physical disabilities.³¹ Children may be Deaf or hard of hearing, blind or otherwise visually impaired, or have mobile impairments that present difficulties in navigating a courtroom. To make the courtroom more accessible to a child with a physical disability, prosecutors should consider using one that has:

- A floor-level witness stand (or ramp to access the stand) and ample room for the child to navigate

²⁸ Fed. R. Evid. 611. ("At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony, or the court may do so on its own...").

²⁹ See *State v. Johnson*, 229 P.3d 523, 535 (N.M. 2010) (upholding trial court's decision to sequester defendant's father as a potential witness due to concerns of testimonial integrity after defendant made numerous calls from jail asking others to intimidate witnesses); *Com. v. Maldonado*, 2 N.E.3d 145, 153 (Mass. 2014) (noting that witness intimidation and courtroom disruption by gang members justified trial court order that trial court spectators must provide identification).

³⁰ Analysis on West Virginia's identical rule is instructive. See 1 Handbook on Evidence for West Virginia Lawyers § 615.05 (2018) ("It is provided under Rule 615(c) that a person whose presence a party shows to be essential to presenting the party's claim or defense cannot be excluded from hearing the testimony of witnesses. This rule places discretion in the trial judge by requiring a determination as to whether a party has shown that the presence of a witness is essential to the party's case. The normal situation for invoking this rule would be where 'an expert [is] needed to advise counsel.' It would be essential to give counsel the benefit of his or her expert assistance while an expert for the other party is testifying. This is especially true where counsel lacks the expertise to deal with technical matters effectively without the assistance of an expert... Of course, a trial court is vested with discretion and may permit expert witnesses to be exempt from the rule in order that they may hear other witnesses testify and then base their opinion on such testimony...")

³¹ U.S. Access Board Courthouse Advisory Committee, *Justice for All: Designing Accessible Courthouses* (Nov. 15, 2006) <https://www.access-board.gov/files/advisory-committee-reports/caac-report.pdf>

- Comfortable seating for the child in the witness stand, avoiding harsh materials that may pose difficulties for children with sensory issues
- Assistive listening systems (for individuals who communicate verbally)
 - It is important that any assistive listening system is compatible with hearing aids and that the courtroom has sufficient signage to notify individuals of the presence of the assistive listening system.
- Adequate lighting within the courtroom (non-fluorescent light is preferable)
- Clear and simple signage, including large print or Braille if necessary, to help individuals navigate the courtroom

Sensory Issues

When considering the child's comfort and possible need for accommodations, prosecutors may wish to ask certain questions to better understand what accommodations to include in pretrial motions. Examples of these questions and possible considerations include:

- Does the child have any sensitivities to sound?
 - White noise could be eliminated.
- Does the child have sensitivities toward lighting?
 - Dim, lamp lighting could be used rather than natural light.
- Does the child have other sensory or stimuli sensitivities?
 - Large groups of people could make the child nervous.
- Does the child have any other "triggers"?
 - Specific sensitivities could include certain phrases, sitting for a prolonged period of time, etc.

Prosecutors may benefit from utilizing visual aids for the child to express their emotions.³² For example, prosecutors may wish to have symbol cards or a visual rating scale which the child can point to and use to identify their emotions. Beforehand, prosecutors should also agree with the child that if they point to a certain symbol or number, they can take a break.

³² Lexicon Limited, *Planning to Question Someone with an Autism Spectrum Disorder Including Asperger Syndrome* (Toolkit 3, 2014).

Testimonial Aids

Children with disabilities who struggle with communication may benefit from the use of testimonial aids, such as anatomical diagrams, when it is purposeful and contextually appropriate. Both the child and prosecutors may benefit from utilizing these aids in a way that bolsters clarity and communication.

Anatomical diagrams are used to name body parts to establish common language. (Post-disclosure diagrams are used for clarification purposes.) The anatomical diagrams should be unclothed, proportionally appropriate pencil sketches that contain body parts, such as those provided by Zero Abuse Project. They should also match the age and ethnicity of the child and should never be perpetrator-focused.

Research shows the use of anatomical diagrams can assist children in clarifying their disclosure, as well as demonstrate their experience in the absence of language facilitation. Diagrams can additionally ease the disclosure of previously unreported touches due to the memory cue. For these reasons, the use of anatomical diagrams can be very beneficial to children and adults with disabilities, when used in a planned and purposeful manner, such as in the following examples:

- A child lacks the language for describing a body part involved in their abuse disclosure but can indicate the body part on the diagram.
- A child uses the diagram to indicate all the places they have been struck.
- A child uses the word “vagina” in the interview, but when using the diagrams, indicates anal penetration.

Selecting or Defending an Expert Witness

Potential Risks

Prosecutors should navigate the use of expert witnesses with caution. First, unless circumstances are extraordinary, prosecutors should do everything in their power to avoid allowing the expert witness to evaluate the child in person to avoid unnecessary stress on the child.³³ Prosecutors can instead provide the expert witness with IEPs, academic records, and copies of all depositions, where adults who regularly interact with the child have testified about the child's disability.

Second, prosecutors should proceed with extreme caution if using the child's treating therapist as an expert witness, as they may create a significant risk of waiving the child's patient-client privilege, thus allowing all therapy records to be obtained by the defense.³⁴ If therapy records are obtained, the child's therapist's notes may be taken out of context, resulting in damage to not only the case, but

³³ Christina Rainville, *Presenting Evidence of a Child's Disability at Trial*, ABA: Child Law Practice Today (Oct. 1, 2013), available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/october-2013/presenting-evidence-of-a-childs-disability-at-trial/

³⁴ *Id.*

also the child's mental health and trust in prosecutors. It is recommended that prosecutors file pretrial motions to prevent any undue disclosure of irrelevant information contained in the records. Motions to quash subpoenas should be filed if privileged information is requested by the defense. If records come into the possession of the prosecution that are not relevant, prosecutors are advised to follow applicable rules of discovery but request that the court conduct an *in camera* review to determine appropriate disclosure and protect confidentiality.

Potential Benefits

Alternatively, an expert witness who can testify on behalf of the child's needs, disability, and unique struggles can provide credibility and influence the jury.³⁵ An expert witness may also provide valuable testimony reaffirming the courtroom accommodations sought for the child. In a 2003 study,³⁶ when jurors were given information about the extent of the victim's disability, the jurors were more likely to:

- Vote for a guilty verdict
- Have more confidence in the defendant's guilt
- Consider the victim to be more credible and the defendant less credible
- View the victim as more honest and less likely to have fabricated the accusation.

An expert witness who can testify about the extent of the child's disability may aid in garnering the same results from the jury.

Using IEPs

Diagnosis

Under the Individuals with Disabilities Education Act (IDEA), every child is entitled to a free and appropriate public education (FAPE) in the least restrictive environment (LRE).³⁷ The primary way to provide FAPE is through an Individualized Education Program (IEP).³⁸ Developed by a team of people focused on the best interests of the child, the IEP is intended to address the child's educational, employment, and independent living needs.³⁹ The IEP outlines the child's diagnosed disability, records their current academic achievement and functional performance, and sets goals for the child.⁴⁰ With the intention of keeping the child in the LRE—typically the general education

³⁵ *Id.*

³⁶ Bottoms, Bette L., Kari L. Nysse-Carris, Twana Harris, and Kimberly Tyda. "Jurors' Perceptions of Adolescent Sexual Assault Victims Who Have Intellectual Disabilities." *Law and Human Behavior* 27(2), April 2003, 205-227.

³⁷ 20 U.S.C. § 1412(a)(1)

³⁸ 20 U.S.C. § 1401(14)

³⁹ 20 U.S.C. § 1414(d)(1)(B)

⁴⁰ 20 U.S.C. § 1414(d)(1)(A)(i)

classroom—the IEP outlines accommodations to be employed by educators to address the child's needs and support their success.⁴¹

Examples of Accommodations

The accommodations included in IEPs have demonstrated success for the particular child in the past and may be suitable for courtroom use. Examples of possible accommodations include:⁴²

- Additional time to answer questions
- Breaks between tasks
- Limit on time a child can be engaged in an activity
 - Courtroom application: limiting the time the child is examined and cross-examined, such as limiting to 30 minutes total and 15 minutes for each side
- Simplified wording/rephrasing
- Peer support/adult modeling
 - Courtroom application: practice answering questions in the courtroom prior to the trial and model appropriate courtroom behaviors

Defending the Child's Competency

Under federal law, competency examinations may only be conducted if there exists a compelling reason to request and offer proof of incompetency.⁴³ In many cases, the defense may attempt to raise the issue of the child's competency to cast doubt on their credibility. Being informed on the best childhood competency practices may help prosecutors find new ways to prove a disabled child's competency.

Jurisdictions typically use two methods to test for child competency. The first method is basic competency, which requires the child to possess the ability to perceive, remember, and communicate. Basic competency is most often evidenced in the child's ability to report a recent event (e.g., "Tell us about your last birthday. Tell us everything that happened, from the beginning to the end").⁴⁴ The second method is truth-lie competency, which requires the child to differentiate between a truth and a lie, in addition to recognizing the importance of telling the truth (and sometimes the consequences of telling a lie).⁴⁵ Truth-lie competency is often evidenced by asking

⁴¹ *Id.*

⁴² Eve Kessler, Esq., *Examples of Accommodations & Modifications*, Smart Kids with Learning Disabilities, available at <https://www.smartkidswithld.org/getting-help/the-abcs-of-ieps/examples-of-accommodations-modifications/> (last visited June 8, 2021) (listing a number of accommodations and modifications).

⁴³ 18 U.S.C. § 3509(c) (2018).

⁴⁴ Thomas D. Lyon, 15. *Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law*, in CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 69, 70 (Michel E. Lamb et al. eds., 2nd ed. 2011).

⁴⁵ *Id.* at 70-72.

the child whether statements are the truth and by asking the child to promise to tell the truth. Additionally, the child's truth-lie competency may be bolstered if the child is able to correct obvious falsehoods when their story is recounted back to them (e.g., a forensic interviewer asks to clarify a certain aspect and deliberately uses the wrong facts).⁴⁶

In general, the preferred method of testing child competency is basic competency. Truth-lie competency is less effective for a number of reasons. First, a child who fails truth-lie questions but is still capable of basic competency may be found competent in many jurisdictions. This preference for basic competency may be due to the fact that children's understanding of the truth evolves quickly at a young age—a child may struggle to differentiate between truth and lies during the forensic interview but have a full, intelligible understanding by the time of trial.⁴⁷ Second, truth-lie competency may not be a prerequisite for the admissibility of hearsay, depending on jurisdiction.⁴⁸ Third, using truth-lie competency gives the defense an option to also test for the same competency. However, the defense is less inclined to use age-appropriate questions and may trip up the child.⁴⁹ (In this case, prosecutors can object to the defense's questions as prejudicial or irrelevant.) One best practice is to create a fact story and ask the child if the character told the truth (e.g., ask a child to identify an object, tell them another child identified the object as something else, and ask the child if the other child was telling the truth).⁵⁰ Using this method may counter a child's reluctance to challenge an adult or to acknowledge making false statements.⁵¹

While competency tests cannot *predict* the likelihood of the child's truthfulness, they can help increase the likelihood of the child's truthfulness.⁵² Prosecutors should be aware that a child's suggestibility does not directly correlate with the child's ability to provide relevant and truthful testimony; tests that assess the child's suggestibility identify children on a continuum, rather than distinguish between competent and incompetent. As long as the child has not been subject to suggestive questioning before or during the trial, the child's suggestibility should have little to no relevance to proving the child's competency.⁵³

Selecting a Jury

During jury selection, prosecutors need to determine individuals' biases against people with disabilities, while also setting the sympathetic tone that will continue throughout the case. The following are questions to consider asking:⁵⁴

⁴⁶ *Id.* at 73.

⁴⁷ *Id.* at 77.

⁴⁸ *Id.* at 78.

⁴⁹ *Id.*

⁵⁰ *Id.* at 80.

⁵¹ *Id.*

⁵² *Id.* at 69.

⁵³ *Id.* at 72.

⁵⁴ Christina Rainville, *Presenting Evidence of a Child's Disability at Trial*, ABA: Child Law Practice Today (Oct. 1, 2013), available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/october-2013/presenting-evidence-of-a-childs-disability-at-trial/ (outlining potential jury selection questions).

- Does anyone here believe that a child with a disability is:
 - Incapable of telling the truth?
 - Less likely to tell the truth?
 - Less credible than a child without a disability?

- Can you listen to [child's] testimony and treat [child] with the same fairness as any other victim?

Prosecutors should explore jurors' expectations of child victims more broadly, especially where they intersect with unique communication methods. For example, jurors who adopt the myth that eye contact is correlated with truthfulness will not accurately assess victims' and perpetrators' relative levels of credibility. Depending on the facts and circumstances, questions to consider asking include:⁵⁵

- Would you be surprised if an abused child:
 - Had emotional or behavior problems?
 - Became involved with drugs or alcohol?
 - Became promiscuous?

- Would you expect a young child to:
 - Immediately realize the need to report the abuse to law enforcement?
 - Have the means to report their abuse without the help of a trusted adult?

- Have you ever testified in court?
 - How did you feel?
 - Were you nervous?
 - Based on your experience, do you feel a child testifying in court might also be nervous?
 - Do you believe a child may also feel uncomfortable speaking publicly about sexual matters? Why?

- Have you been consistent as to each detail of your [X life event] as you described the event over the years?
 - Would you agree that sometimes we are tired and may not tell all the details of an event when asked?
 - Would you agree that sometimes a question focuses us on a different aspect of an event and that our answer reflects the focus of the question?
 - Would you agree that, as time passes, our memory for the details of the event fades?

- Does anyone think being [child's age] would make it easier to discuss a sexual encounter with strangers?

⁵⁵ Robert J. Peters, *You Have Chosen Wisely: Jury Selection in Child Abuse Cases* (Zero Abuse Project, 2021).

- Does anyone here expect a child victim of ongoing sexual abuse to recall every detail of the alleged encounters—including what they wore during each incident?
- Would you expect a child to recall the exact dates and times they were sexually abused?
- Do you believe that all victims of sexual abuse respond in the same way?
 - Would you believe that an abuse victim who laughs must be lying?
 - Would you believe that an abuse victim who is unusually quiet must be lying?
 - Would you believe a victim who appears nervous or does not make eye contact must be lying?
 - Would you believe that an exceptionally confident, blunt, or unemotional victim must be lying?

Case Themes

Risk Factors

During opening and closing statements and throughout questioning, prosecutors should highlight that children with disabilities are at increased risk for and more vulnerable to abuse and maltreatment, and this fact should be incorporated into prosecutors' case themes. This frame enables prosecutors to turn perceived case weaknesses into strengths: the perpetrator exploited legitimate vulnerabilities and did so in the cynical belief that others would find the child untrustworthy. Factors related to disability that contribute to or increase the risk of abuse include:

- Attitudes that devalue children with disabilities, and attacks on the credibility of their reports and statements⁵⁶
 - Concerns about suggestibility and the credibility of victim outcries and statements may cause undue or unsubstantiated skepticism.
- Increased intrafamilial stress⁵⁷
 - A lack of support, training, and resources for parents and caregivers can increase family stress and create intrafamilial vulnerabilities.
- Social isolation
- Physical limitations

⁵⁶ Bowles, P. V. & Sharman, S. J. (2014). A review of the impact of different types of leading interview questions on child and adult witnesses with intellectual disabilities. *Psychiatry, Psychology and Law*, 21(2), 205-217.

⁵⁷ Aff, T. O.; Taillieu, T.; Cheung, K.; Katz, L. Y.; Tonmyr, L. & Sareen, J. (2015). *Substantiated reports of child maltreatment from the Canadian incidence study of reported child abuse and neglect 2008: Examining child and household characteristics and child functional impairment*. *CANADIAN JOURNAL OF PSYCHIATRY*, 60(7), 315-323.

- Increased dependence on caregivers⁵⁸
- Injury from abuse masked by disabilities
- Lack of understanding that abuse has occurred and presence of encoding errors⁵⁹
- Lack of language facilitation needed to report or disclose⁶⁰
- Lack of safety education for children, parents, and caregivers
- Lack of options for specialized care and out-of-home placements
 - Children with disabilities in out-of-home care are more at risk of sexual abuse.⁶¹

Grooming

It is also important for prosecutors to describe grooming behaviors employed by the perpetrator. These behaviors can serve as additional corroborating evidence and accurately convey the severity of the perpetrator's behavior.

Grooming is a tactic used to manipulate and control another individual, often by exploiting a power imbalance.⁶² Grooming typically occurs in four stages:⁶³

- Targeting the child by evaluating their vulnerability
- Filling a need of the child
- Isolating the child
- Maintaining control of the child.

Prosecutors should highlight the increased vulnerability of the child due to their disability. They can then expose the perpetrator's manipulative behaviors of targeting the child, gaining the child's trust and the trust of those around the child, and exploiting the child's disabilities for their own pleasure and benefit.

Conclusion

Every child that experiences the criminal justice system should be treated with care, concern, and respect, regardless of their individual challenges. However, children with disabilities are uniquely impacted by the traumas resulting from child maltreatment.

⁵⁸ Martinello, E. (2014). Reviewing strategies for risk reduction of sexual abuse of children with intellectual disabilities: A focus on early intervention. *Sexuality and Disability*, 32(2), 167-174.

⁵⁹ *Id.*

⁶⁰ Wilczynski, S. M.; Connolly, S.; Dubard, M.; Henderson, A. & McIntosh, D. (2015). *Assessment, prevention, and intervention for abuse among individuals with disabilities*. *Psychology in the Schools*, 52(1), 9-21.

⁶¹ Euser, S.; Alink, L. R.; Tharner, A.; IJzendoorn, M. H. & Bakermans-Kranenburg, M. J. (2016). *The prevalence of child sexual abuse in out-of-home care: Increased risk for children with a mild intellectual disability*. *JOURNAL OF APPLIED RESEARCH IN INTELLECTUAL DISABILITIES*, 29(1), 83-92.

⁶² Adult Advocacy Centers, *Prosecutor's Guide for Crimes Involving Victims with Disabilities*, 1, 12 (Feb. 2020).

⁶³ *Id.*

This guide provides the tools prosecutors need to handle these important cases and empowers them to serve and advocate for child victims' unique physical, cognitive, and emotional needs resulting from their disabilities. By using the tips and tactics presented in this guide, prosecutors can successfully navigate: the pretrial process, preparation of the child to testify, development of courtroom accommodations, expert witness and competency considerations, jury selection, and integration of case themes. Implementing these strategies will assist prosecutors in the pursuit of justice and ensure the protection of the most vulnerable children.

Appendix A

Sample Motion for Courtroom Accommodation with Supporting Memorandum

STATE'S MOTION FOR SPECIAL PROCEDURES DURING THE PRESENTATION OF CHILD VICTIM TESTIMONY AND MEMORANDUM IN SUPPORT

Comes now the State of _____, by and through its Assistant District Attorney _____, and hereby requests that the following procedures and modifications in the courtroom be used during the child victim's testimony:

1. That _____ and _____ be permitted to bring a transitional object to the witness stand, such as a small comfort item or toy;
2. That _____'s therapist, _____, be permitted to be present in the courtroom during _____'s testimony, standing next to _____, _____ having provided trauma therapy to _____;
3. That the Victim Advocate, _____, be permitted to sit at Counsel for the State's table during child victim testimony;
4. That supportive adults, familiar to _____ and _____, be permitted to stand next to _____ and _____ during their respective testimony;
5. That representatives of Bikers Against Child Abuse (BACA) be permitted to be present in the courtroom at the time of testimony;
6. That objections by Counsel for the Defendant be made by raising a hand and stating in a quiet tone of voice the general nature of the objection (i.e. hearsay, relevancy, prejudicial, etc.) using fewer than 10 words; if a lengthy discussion is necessary for the court to rule on the objection,

the State would request that a break be taken to allow the child to leave the room during the discussion;

7. That, to the extent necessary to develop the child's testimony, leading questions be permitted during direct examination;

8. That during _____ and _____'s testimony, the Defendant be prohibited from approaching the witness stand or bench, and that if such a conference with the Court becomes necessary, that _____ and _____ be permitted to leave the courtroom before the Defendant approaches.

MEMORANDUM IN SUPPORT OF STATE'S MOTION

I. INTRODUCTION

This case involves two vulnerable, male child victims of sexual abuse, who are understandably reluctant and afraid to discuss the Defendant's perpetration in private, let alone in a large, public courtroom with their abuser present.

Because of the special needs of young children, the adult, formal, adversarial environment of a courtroom may be the very worst environment in which to elicit reliable information from child witnesses. The special procedures and protections requested above are designed to provide for the special needs of child witnesses and obtain the most reliable information possible. As one judge has noted:

"To assure a fair trial, judges have special responsibility for child witnesses... Judges must remember that a child may be alert and communicative at 9:00 a.m., but sleepy and anxious a few hours later. Judges should appreciate that, for a child, even 15 or 20 minutes on a witness stand may be unmanageable.

"Some lawyers carelessly argue that such courtroom techniques take the side of the child. They fail to acknowledge that **such techniques help a child**

communicate, but do not tell a child what to say. The techniques are analogous to providing a Spanish-speaking or hearing-impaired person with a translator, or allowing a disabled veteran to testify from a wheelchair. In fact, many lawyers enthusiastically endorse these evolving laws and techniques, realizing their potential value for child witnesses for the defense, or for plaintiffs in civil lawsuits. None of these techniques supports the substance of the child's testimony. All of these techniques, however, reduce discrimination that has denied judges and juries the chance to hear a child's testimony." Judge Charles B. Schudson, *Making Courts Safe for Children*, 2 JOURNAL OF INTERPERSONAL VIOLENCE 120, 121 (1987).

The procedures above are in keeping with Rule _____ of the _____ Rules of Evidence and the purpose of evidentiary law, "to the end of ascertaining the truth and securing a just determination."

II. THE USE OF SUPPORT PERSONS

Numerous courts have repeatedly allowed support persons to be present during child victim testimony and have even permitted the child witnesses to sit in their laps, as long as the support person is carefully admonished not to do anything that might influence the child's answer to a particular question. These courts have recognized that support persons can reassure a child who is thrust into a difficult and strange situation and thereby enable them to better relate events to the court.

The nature of the testimony coupled with the presence of the defendant may cause extreme anxiety on the part of the child witness resulting in confused testimony. The use of a support person may keep the child from being distracted.

The _____ Rules of Evidence addressing witness sequestration are found in Rule _____. Rule _____ provides that the rule does not authorize excluding "a person whose presence a party shows to be essential to presenting the party's claim." The traumatic context and setting of child sexual abuse victim testimony, and the interests of evidentiary law and the Court in ensuring the most reliable information is elicited at trial, suggest the importance of permitting a

support person's presence.

Pennsylvania, citing a court's broad discretion to conduct the trial, also allows the use of support persons. *Commonwealth v. Pankraz*, 554 A.2d 974 (Pa. Super. Ct. 1989). In allowing a four-year-old child to sit on her grandmother's lap during testimony, the court observed that the child's testimony did not appear to be in any way influenced by her grandmother. *Id.* at 979. Neither the child nor the grandmother spoke to the other during the testimony.

An Ohio appellate court found no constitutional violation, nor an abuse of discretion by the trial court, in allowing an eight-year-old witness to sit on the lap of a relative during the presentation of testimony. *State v. Johnson*, 528 N.E.2d 567, 569 (Ohio Ct. App. 1986), *cert. denied*, 111 S. Ct. 81 (1990).

In *State v. Dompier*, 764 P.2d 979 (Or. Ct. App. 1988), the court allowed the victim to sit on her foster mother's lap after repeatedly being unable to testify as to the specific details of the sexual abuse. While on her foster mother's lap, the victim answered both the prosecutor's and defense attorney's questions and gave detailed testimony on the claimed sexual abuse. *Id.* at 980; see also, *Mosby v. State*, 703 S.W.2d 714 (Tex. Ct. App. 1985) (support person permitted to sit with child); Cal. Penal Code § 868.5 (1985).

The emotional difficulties children experience when asked to recall certain events are severe, particularly where, as here, the perpetrator of those offenses is only a few feet away in the courtroom. Having a trusted adult available for general comfort and support and to provide the child with a basic sense of safety may be necessary if the child is expected to be able to answer any questions at all. As long as the support person(s) is carefully admonished not to attempt to influence the child's testimony in any way, the presence of such a trusted adult can only enhance the ability of the child to communicate and for the trier of fact to determine the truth—which should be in keeping with the interest of both parties in this matter.

III. THE USE OF LEADING QUESTIONS ON DIRECT EXAMINATION OF THE CHILD WITNESSES

Rule _____ of the _____ Rules of Evidence states "Leading questions should not be used on direct examination except as necessary to develop the witness's testimony."

Accordingly, the decision to allow leading questions on direct examination is within the sound discretion of the trial court. Traditionally, leading questions have been allowed on direct examination of embarrassed, reluctant, fearful, or forgetful witnesses.

Leading questions may also be permitted, at the discretion of the court, where the witness is ignorant or forgetful. Youthful witnesses fall in this class, and leading questions find a special usefulness in the trials of sex offenders when young children must testify, with the courts sometimes saying that leading questions are justified because of the embarrassing nature of the testimony, or because of the demands of modesty. Underhill, H.C., *Criminal Evidence*, 1207–1208 (5th ed).

Numerous appellate courts have upheld trial judges' decisions allowing the use of leading questions of child witnesses in sexual abuse cases because of the sensitive nature of the subject and the understandable hesitancy, embarrassment, anxiety, and shame of the witnesses. See, e.g., *Rotolo v. United States*, 404 F.2d 316 (5th Cir. 1968) (15-year-old-child); *People v. Kosters*, 438 N.W.2d 651 (Mich. Ct. App. 1989) (five-year-old-child); *State v. Chandler*, 376 S.E.2d 728 (N.C. 1989) (two to five-year-old children); *Altmeyer v. State*, 519 N.E.2d 138 (Ind. 1988) (10- and 14-year-old children); *Nash v. State*, 519 A.2d 769 (Md. 1987) (13-year-old child); *People v. Server*, 499 N.E.2d 1019 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 842 (1987) (nine-year-old child); *Commonwealth v. Baran*, 490 N.E.2d 479 (Mass. App. Ct. 1986); *State v. Hawthorne*, 523 S.W.332 (Mo. Ct. App. 1975) (eight-year-old witness); *Wright v. Blakeslee*, 128 A. 113 (1925).

IV. THE MANNER AND SCOPE OF QUESTIONING

The ability of children to provide meaningful testimony that is helpful to the ascertainment of the truth can be significantly affected and diminished unless this Court takes a proactive role in limiting the manner and scope of the questioning. The State has asked the Court to assure that objections be made in a quiet, non-threatening manner, and that the scope of questioning be limited to areas which are essential.

In *In re Pamela A.G.*, 134 P.3d 746 (N.M. 2006), the New Mexico Supreme Court noted that "protecting the child's emotional state" was of the utmost importance. For that reason, it is necessary to assure the child a modicum of protection. See generally, Parker J., "The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?" 17 *New Eng. L.J.* 3 (1982).

----- Rule of Evidence ----- empowers the court to control the mode and manner in which witnesses will be questioned to (1) assure that such questioning is "effective for determining the truth, (2) avoid wasting time, and (3) protect witnesses from harassment or undue embarrassment." This includes regulation of the manner in which objections are made, *Commonwealth v. Amirault*, 535 N.E.2d 193, 207 (Mass. 1989), the method and duration of cross-examination, *People v. Conyers*, 382 N.Y.S.2d 437, 441 (1976), and the length of questioning, *Commonwealth v. Brusquilis*, 496 N.E.2d 652, 656 (Mass. 1986). As one court has noted:

"[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *State v. Catsam*, 534 A.2d 184, 378 (Vt. 1987), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Thus, there is ample authority to support the State's request that the Court regulate the mode and manner of examination of these child witnesses.

STATE OF _____

By Counsel

Appendix B

Sample Motion to Quash Subpoena for Victim Records

NOW COME THE PEOPLE OF THE STATE OF _____ by their attorney, _____, District Attorney of _____ County, (State), _____ Judicial Circuit, by Assistant District Attorney _____, hereby request this Court to enter an Order with quashing a subpoena duces tecum, and in support thereof states as follows:

1. That the Defendant issued a subpoena on the custodian of records for Victim's Middle School/Victim's therapist/Victim's medical doctor/Children Youth and Family Services, located at _____, (State) and the subpoena was served on _____ and filed with the Court on _____. The subpoena has a return date of _____.
2. The subpoena requests school records for J.P. for the school years of 2014-2016 including any attendance records, behavioral reports, grades, and progress reports. The subpoena was issued to the school citing the criminal case number and name of the Defendant. (sample language, adjust to make case specific)
3. J.P. is entitled to privacy as a victim of a violent crime and the issuance of this subpoena to the school for records is an invasion of that privacy. Pursuant to the (State) Victims' Rights Law _____, a victim shall have the right to: be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;

4. The date range on the Bill of Indictment is June 27, 2015 through February 1, 2016.
5. None of the records requested by the subpoena would be relevant or admissible in a criminal trial against the Defendant. Therefore, the subpoena should be quashed.
6. In the alternative, the People request an in camera review of these records to determine any relevant or admissible records. However, the return date of the subpoena is the morning of trial and this raises concerns about the Court's ability to review them prior to trial and the State's ability to prepare for any rebuttal.

WHEREFORE the People pray the Court enter an order quashing the subpoena or in the alternative review the records in camera.

Respectfully Submitted,

Assistant District Attorney

Appendix C

Sample Motion to Allow Child Witness to Testify with Facility Dog with Sample Jury Instruction

Sample Motion to Allow Child Witness to Testify with Facility Dog

NOW COME THE PEOPLE OF THE STATE OF _____, by their attorney, _____, District Attorney of _____ County, (State), _____ Judicial Circuit, by Assistant District Attorney _____, hereby request this Court to enter an Order with respect to the State's Motion to Allow Child Witness to Testify with Facility Dog at trial, and in support thereof respectfully state and allege unto this Court as follows:

1. That Defendant is charged with multiple counts of Sexual Assault, for incidents that involve children under the age of 18 and/or a child with a disability that occurred in _____ County, (State) over a period of time alleged in the Indictment.
2. That the People expect the courtroom testimony during this trial to be an uncomfortable and traumatic experience, enhanced by the young age of the victims, the relationship with the accused, and the subject matter of the testimony.
3. That all the children have become acquainted with the certified facility dog "Fitz" and expressed a desire for Fitz to be present in the witness box with them while testifying to provide a calming influence and sense of familiarity to the witness.
4. That Fitz is a graduate of an assistance dog organization that is a member of Assistance Dogs International. See People's Exhibit #1 for a current letter of certification for Fitz from Support Dogs, Inc. Fitz's training meets the guidelines and criteria set forth by Assistance Dogs International and Duo Dogs. Duo is a not-for-profit organization based in St. Louis, Missouri that trains

and connects dogs with people to cultivate positive change in individuals, families and communities. Fitz has been certified since 2019. His greatest strength is his ability to calm and comfort others in stressful situations and provide emotional support. Fitz has assisted child victims in 2 trials and 10 sentencing hearings as of May 2021.

5. That pursuant to _____ of the (State) Victims' Rights Law, crime victims SHALL have the following rights:

a.) the right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process

6. Pursuant to the (State) Rules of Evidence _____, the court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to (1) make those procedures effective for determining the truth, (2) avoid wasting time, and (3) protect witnesses from harassment or undue embarrassment.

7. In February 2021, the American Bar Association passed a resolution urging the passage of statutes and laws allowing facility dogs for witness support. The resolution states "RESOLVED, that the American Bar Association urges federal, state, local, territorial and tribal governments and foreign governments to enact laws authorizing courts to allow specially trained dogs (called facility dogs) to assist victims/vulnerable witnesses in their participation at any stage of the criminal justice system, including during their testimony in any judicial proceedings, and, to ensure the health and well-being of the facility dogs." American Bar Association Resolution 101A, February 22, 2021.

8. Seventeen states throughout the country have laws in place to allow the use of an animal for witness support including Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Louisiana, Michigan, Mississippi, Oklahoma, South Dakota, Virginia, Washington.

9. That courts in many other jurisdictions have recognized the benefits of allowing a child to testify with a comfort item that will provide a calming influence on that child, and those courts have held that the benefits outweigh any potential prejudicial effect on the accused. *People v. Chenault*, 227 Cal. App.4th 1503 (2014); *State v. Dickson*, 337 S.W.3d 733, (Mo. Ct. App. 2011); and *People v. Tohom*, 109 A.D.3d 253 (2013), *State v. George*, 2014-Ohio-5781 (AppCt, 2014), *State of Texas v. Smith*, 491 S.W.3d 864 (Tex.App. 2016).

10. The People propose the attached jury instruction be read to the jury prior to the children's testimony to cure any potential risk of prejudice or bias.

Wherefore, the People pray that this Court find that for the various reasons set forth above, that the victims be permitted to have Fitz, the certified facility dog, with them in the witness box while testifying at trial in this matter and grant unto the State such other further relief to which this Court deems the State entitled.

Respectfully submitted,

DISTRICT ATTORNEY

COUNTY, (STATE)

By: _____

Assistant District Attorney

Sample Non-Pattern Jury Instruction Regarding Use of Facility Dog

The presence of the dog is a reasonable accommodation to the witness to allow him/her to fulfill the obligation of testifying in a court of law. The dog is a highly trained professional who is properly referred to as a “facility dog.” This dog is not a pet, does not belong to the witness and is equally available to both the prosecution and defense under certain circumstances.

You must not draw any inference either favorably or negatively for either side because of the dog's presence. You must not permit sympathy for any party to enter into your considerations as you listen to the testimony. The presence of the facility dog is in no way to be interpreted as reflecting on the truthfulness of the testimony offered by the witness.

Each witness's testimony must be evaluated upon the instructions I give you during my charge and on nothing more.

